Supreme Court, U. S.
FILED
SEP 7 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 52, Original

UNITED STATES OF AMERICA,
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant

Florida's Response to Exceptions of the United States to the Report of the Special Master

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel

725 So. Calhoun Street
Tallahassee, Florida 32304

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STATEMENT

The United States' exceptions to the Report of the Special Master question (a) his conclusion that waters east of a straight line between the East Cape of Cape Sable and Knight Key comprise a juridical bay and are inland waters of the State of Florida, and (b) his finding that narrow waters within each of three groups of islands in the lower Florida Keys are inland waters of the State of Florida.

The first objection is based solely upon foreign policy considerations, and the second is like unto it, but with added emphasis upon Federal priorities in establishing baselines to enclose archipelagoes.

Neither exception takes cognizance of the constitutional question presented by the Master's Report. Both exceptions candidly concede that the result reached by the Master is of little significance as a practical matter in treating with the subject geography since there is small moment in whether Florida's historic boundaries are measured from closing lines of a juridical bay or from the natural shorelines involved (U. S.

Exceptions, pg. 7), or whether the "island groups" involved are enclosed as determined by the Master or as determined using natural shorelines (U. S. Exceptions, p. 16). Neither Exception, admits the United States, substantially affects disposition of seabed rights in the case.

Yet, for reasons of a "larger international significance" (U. S. Exceptions, p. 7), and the unique "archipelagic principle involved" (U. S. Exceptions, p. 19), the United States urges that the Master be disregarded on these two points. Because Florida's historic boundaries and the Master's treatment of them give rise to some embarrassment in the conduct of foreign affairs (U. S. Exceptions, p. 18), Plaintiff insists that the Court must set the boundaries back.

As far as the United States is concerned, foreign affairs is the consideration *ne plus ultra.* This consideration is followed closely by concern for "national security" and "commercial shipping interests", in that order (U. S. Exception pp. 18-19).

Rights asserted by ten million citizens of the State of Florida based upon their historic concept of the geographical unit the United States Congress recognized and approved Florida to be, and other questions of the nature of State-National relations, are omitted from concern expressed by the United States and are conspicuous by their absence. In the name of foreign affairs, the National Government wants all or nothing from the Special Master. And, indeed, it appears on close consideration of the Report and United States' Exceptions to it, that the Special Master gave it all to them.

But, in the process, a couple of things were overlooked, both by the United States and by the Special Master. Their consideration, if considered at all, must affect conclusions of fact upon which the United States' arguments are advanced, and, consequentially, conclusions upon which the Special Master relied. These facts are discussed here for the first time, with permission of the United States obtained in advance.

RESPONSE

Florida's Response to Exceptions of the United States is, essentially, two-fold:

(a) That the juridical bay objection is well-founded, but for wrong reasons: Florida Bay, is, as previously pointed out, an historic bay. The United States and the Special Master have overlooked open acts of dominion exerted by both State and Federal authorities, and have consistently but erroneously maintained that there has been no recognition of Florida primacy by a foreign government, and

(b) That the "foreign affairs" premise for objections noted is a *non sequitur*, for the United States has no authority in the conduct of foreign affairs to bargain away the territory of a State.

I.

FLORIDA BAY IS AN HISTORIC BAY – THE BURDEN OF PROOF IMPOSED BY THE SPECIAL MASTER WAS INAPPROPRIATE.

> *"During the questioning by Senator Long, Mr. Dean made it clear that the Conventions do not affect the relative rights as between the several States of the United States and the Federal Government. The Conventions only affect the rights of the United States as a soverign state with respect to the rights of other sovereign states."*[1]

> *"In the Constitution the term "state" most frequently expressed the combined idea . . . of people, territory and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed."*[2]

In its opening sentence of Argument, the United States describes two essential differences between positions of the parties here. (U. S. Exceptions, p. 7; emphasis supplied):

[1] Summary of testimony of Mr. Arthur H. Dean, Special Consultant to the Department of State, who was Chief of the U. S. Delegation at the negotiations in Geneva which resulted in the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas; from Congressional Record-Senate, April 26, 1960, pg. 11191.

[2] Chief Justice Chase speaking for the Court in *Texas* vs. *White*, 7 Wall. (U.S.) 700 at p. 721 (1868).

The determination whether Florida Bay is a juridical bay constituting inland waters of the State of Florida *has little importance to the final determination of the respective seabed rights* of the United States and the State *under the Submerged Lands Act.*

1.

First, a determination of the status of Florida Bay as *juridical* is, by definition, a crucial limitation upon territory, and hence, initial sovereignty over the area. To suggest that such a determination has "little importance" to respective rights involved is to ignore the core issue.

Florida's position is that Florida Bay, delimited in the State's 1868 Constitution, is an *historic* bay; not a *juridical* bay. Therefore, the limitations attendant to juridical bays (i.e., 24-mile closing lines, well-marked coastal indentations, land-locked waters, and other limitations discussed in the Master's Report, pp. 36-47 and in the United States' Exceptions, pp. 7-15) should not be imposed upon State territory here considered (See Florida Exceptions, pp. 31-57).

The Master's characterization of Florida Bay as something less than an historic bay is, to a large extent, what this case is about. To insist that Florida Bay lacks credentials of historical status is to flatly deny more than 100 years of history.

The United States relies confidently upon the Master's finding (at p. 42 of the Report) that since the United States has itself disclaimed sovereign jurisdiction over the area, the State of Florida was obliged to establish by historic evidence "clear beyond doubt" that its historic claims met the three criteria set by the Master (at p. 41 of the Report). The United States, further, relies strongly upon the Master's Conclusion (at p. 46 of the Report) that since Florida failed to come forward and present evidence "clear beyond doubt", its claim to Florida Bay as an historic bay must be denied. Taking as a foregone conclusion, in view of the Report, that Florida Bay is not what Florida urges it to be (which it is), but is, as a matter of law, that which the Master says that it is (which it isn't), the United States attacks the Master's conclusion that it is a juridical bay,

and ignores the Master's errors in avoiding the historic nature of the place. And the United States does it all in the name of foreign affairs.

> In the conduct of its foreign affairs, the United States treats the waters of Florida Bay as territorial seas or international waters. (U. S. Exceptions, p. 7).

It treats as territorial seas, according to its Exceptions and previous arguments to the Master, only three miles measured from mainland islands and certain low-tide elevations along the Bay (U. S. Exceptions, p. 7). The rest of Florida Bay it treats, ostensibly, as high seas.

> ***Approval of the Special Master's determination of the existence of a juridical bay would extend the United States' claim unto *waters previously treated as high seas,* and it would imply adoption by the United States of a principle permitting one side of a bay to be formed by a chain of islands. (U. S. Exceptions, p. 8; emphasis supplied.)

It was this assertion, that the United States had neither exercised nor claimed any dominion in Florida Bay, that prompted the Master to apply the California II Rule[3] subjecting Florida to the "clear beyond doubt" test.

In the present case, the United States takes the position that it has disclaimed any historic title to or sovereign jurisdiction over the extensive area which the State of Florida claims as Florida Bay.

> In *United States* vs. *California* . . . the disclaimer of the United States in the litigation itself was held sufficient to bar the state claim. Here there is not only disclaimer in the litigation but additional evidence of activities and statements by officials of the United States of continued disclaimers of historic title to the waters in question.

[3] *United States* v. *California,* 381 U.S. 139 at 175 (1965) "We are reluctant to hold that such a disclaimer [of the United States] would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But, in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

***The State must show that it, *or the United States*, exercised open, notorious, and effective sovereign authority in the area as against the nationals of foreign states and that the foreign states acquiesced in this exercise of authority. As to this, the evidence submitted by the State is limited indeed. *There is no evidence whatever that the federal government either claimed or exercised such authority over the area beyond the Coastal belt of territorial sea* recognized by maritime states. (Report, pp. 42-43; emphasis supplied).

Neither the United States, in making such averments, nor the Special Master, in relying thereon, considered carefully all the evidence before them. Nor, it is admitted, did Florida make the point which is so amplified by the Master's Report. But the Court's attention is respectfully invited to Florida's Exhibit #168, a Coastal & Geodetic Survey chart of the Florida Keys showing the mainland, the Keys running out to and including the Tortugas, and a straight line added to the printed chart plotted at an angle of 045° from the Tortugas to Cape Romano back on the mainland. The area claimed as an historic bay is clearly shown.

In Florida Bay, two rectangular boxes are described. One, the smaller one, for which the chart was submitted as evidence of an area under a state-granted oil drilling lease, is marked by heavy lines drawn on the chart for that purpose and lies adjacent to the Tortugas-Romano line at the top of the triangular-shaped Bay. The other, overlooked by the parties, and apparently by the Master, is printed on the chart in lighter, broken lines. It is considerably larger than the former, and could be said to dominate the central, navigable area of Florida Bay. It is marked, rather clearly, in the center of the rectangle: "DANGER AREA (see note)." The "Note", also shown on the Exhibit, is clear and unambiguous. It reads:

DANGER AREA

The area within the following limits is not to be entered without U.S. Naval authority. Between parallels 24°36' N, 25°10' N. Between meridians 81°23' W, 82°10' W.

At page 43 of his Report, the Master observed:

> The most common exercise of sovereignty in inland waters is the special control and, often, prohibition of navigation by foreign vessels and of fishing by foreign nationals. The State of Florida offered no evidence that either it or the federal government had ever attempted to control or prohibit the mere navigation by foreign vessels of the area in question.

It would seem that a Danger Area so marked upon a navigation chart appearing on Florida's Exhibit #168, showing an area of Florida Bay of approximately 1,900 square miles closed to navigation without prior permission of the United States Navy, would indicate a "common exercise of sovereignty", clearly within the Special Master's own definition. Moreover, it patently refutes the United States' claim throughout these proceedings (stated unequivocally on page 8 of its Exceptions) that it treats these waters as high seas. This claim, it is respectfully submitted, is erroneous. For authority to so designate danger areas, 33 U.S.C. § 3, limits such regulation to "navigable waters of the United States or waters under the jurisdiction of the United States . . ."

The Court's attention is respectfully invited to the Appendix where recent correspondence between the State and Department of the Army is reproduced together with appropriate danger zone regulations which are self-explanatory. Of particular relevance is the area described under Regulation 204.85c shown on the chart at Appendix 17 supplied by the Department of the Army.

Whether this apparent exercise by the National Government of dominion over a substantial part of Florida Bay indicates a reliance on Florida's historic claim to the area, or whether it is based upon some other unannounced authority, is not material to the issue at this point. But the fact of this act of dominion *is* material to the United States' assertion that it has historically treated the area as high seas, and it should be of some significance to the question of whether the Special Master's denial of the historical bay status should be accepted by this Court, overruled by this Court, or resubmitted to the Master for further consideration.

Since the Federal Government *has*, in fact, asserted dominion in Florida Bay, the "clear beyond doubt" test of evidence to which the Master held Florida in presenting its case must be ruled in error.

In its Exceptions, the United States challenges the Master's conclusion that Florida Bay is a juridical bay for reason that such result would be contrary to foreign policy. Florida challenges the Master's juridical bay determination for reason that such result would be contrary to and an arbitrary limitation upon the area's nature as an historical bay.

2.

Accepting the criteria for approving historic bays announced by this Court in *United States* vs. *California*, 381 U.S. 139 at 172 (1965), to be "bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations", or the even more restrictive criteria demanded by the Special Master (Report, p. 41), Florida's position is not without support.

The Master determined the 1868 Constitution to have been remote enough in time to satisfy his second criterion: that the exercise of authority over the area have continued for a considerable period, but refused to accept Florida's construction of the boundary language contained in that Constitution, contending that (a) the directional call "thence northeastwardly to a point three leagues from the mainland" does not mean what it says (Report pp. 24-26); (b) the boundary line set at 045° from a point three leagues north of the Tortugas straight across the Bay of Florida to a point three leagues from Cape Romano asserted by the State of Florida would encompass an area of comparatively deep water deemed by the United States to be a high seas region in which no dominion had been asserted, either by the United States or Florida (Report, pp. 26-27); and (c) the opinion of this Court in No. 9 Original (363 U.S. 121) and the decree entered in that case (364 U.S. 502), by construing the Submerged Lands Act as a limitation upon Florida's historic boundary claim, effectively adjudicated the issue of Florida Bay.

Assuming that the Master's principle objections to Florida's claim can be overcome by reconsideration of evidence indicating open acts of dominion by the United States (as discussed under Part 1, above), we turn to another primary difficulty expressed

by the Master in his consideration of Florida Bay as historic inland waters:

> [F]oreign states must have acquiesced in the exercise of this authority as against their nationals. (Report, p. 41)

> The State must show that it, or the United States, exercised open, notorious and effective sovereign authority in the area as against the nationals of foreign states *and that the foreign states acquiesced in this exercise of authority*. (Report, pp. 42-43, emphasis supplied.)

As to whether the State exercised open authority over the area of Florida Bay claimed, and whether foreign states acquiesced in such exercise of authority, the Master commented, at p. 43:

> As to this, the evidence submitted by the State is limited indeed.

> There then followed a recitation of evidence offered by Florida to describe its exercise of open authority, most of which is treated with less than enthusiastic approval by the Special Master, and dismissed as inappropriate for reasons indicated. As regards Chapter 57-358, Laws of Florida, 1957, however, the Master had no comment. (Report pp. 44-45). But, while the Master was indifferent to Florida's 1957 legislation, the Executive Department and Senate of the United States were not so silent, at least on the subject matter of the Act: the Tortugas shrimp beds.

> From 1950 to 1956, the area of Florida Bay, the Gulf of Mexico and Straits of Florida known as the Tortugas shrimp beds yielded $38 million worth of shrimp to fishermen, most of whom operated out of Florida and Cuban ports. After indications in 1955 that a large proportion of the shrimp catch was undersized, the State of Florida acted unilaterally to conserve resources in the Tortugas beds by passing Chapter 57-358, Laws of Florida, 1957. (At that time, the legislature met biannually. It may be said, therefore, that the conservation area was established as quickly as possible after the need for such measures became known.)

The 1957 Act defined the Tortugas shrimp beds as follows (§ 370.151(2), Florida Statutes, 1957):

> Beginning at the intersection of the Florida boundary line in the Straits of Florida with the meridian longitude 82°00′ West of Greenwich; running thence westerly along said Florida boundary line in the Straits of Florida to the meridian longitude 82°35′ West of Greenwich; running thence due North along said meridian longitude 82°35′ to its intersection with the Florida boundary line in the Gulf of Mexico, which is a straight line drawn from the island of Dry Tortugas on a bearing of 75° from magnetic north; running thence easterly along said Florida boundary line to its intersection with said meridian longitude 82°00′; running thence Southerly along said meridian longitude 82°00′ to the point of beginning.

The Act gave the Director of the State Department of Conservation discretionary authority to close the shrimp beds to vessels flying the American flag. The Act was subsequently amended to increase the size of the Tortugas shrimp beds to an area almost co-extensive with Florida Bay (§ 370.151, Florida Statutes, 1961). Enforcement activity under the legislation is described, in part, in Justice Ervin's dissent in *Bateman* vs. *State*, 238 So.2d 621 at 626-633 (1970).

Seeking Cuban cooperation to protect these shrimp conservation areas, industry spokesmen sought and obtained intergovernmental conferences involving officials of the Department of State, Department of Interior, State of Florida, and other interested groups. Negotiations between the governments of Cuba and the United States followed. A convention was drafted. Florida state legislative and conservation officials were consulted. They gave their concurrence to the convention.

President Eisenhower transmitted the Convention to the Senate for its advice and consent March 5, 1959. (Department of State Bulletin, April 26, 1959). Senator Fulbright moved the Senate's advice and consent to ratification. (Congressional Record – Senate, June 4, 1959, page 9846). The following extract is from his statement to the Senate; emphasis supplied:

> The Committee on Foreign Relations heard testimony from representatives of the Departments of State and Interior, and received written statements of support from four organizations representing business interests in six Southern States. It was noted that Florida State legislative and conservation officials were consulted and gave their concurrence on the convention. The Committee further noted that Cuba had promptly ratified the convention, *and had carefully observed a "gentlemen's agreement" regarding Florida's regulations pending ratification by the United States.*

Ratification was advised by the Senate on June 4, 1959. The convention was ratified by President Eisenhower June 12, 1959; by Cuba July 29, 1959; and the ratifications were exchanged September 4, 1959, making the treaty effective and in force as of that date. It was proclaimed by the President September 16, 1959 (10 U.S.T. 1703).

The fact of the convention is not, of course, controlling. But, the statement by Senator Fulbright that the Cuban government "carefully observed a 'gentlemen's agreement' regarding Florida regulations" is material to the issue as to whether a foreign state recognized Florida's assertion of authority in the area described by its 1868 Constitution as inland waters of the State.

Under the circumstances described by evidence of (a) United States' acts of dominion in closing vast areas of Florida Bay to navigation; (b) Florida's shrimp conservation regulations in the area (to say nothing of mineral leasing and other acts of sovereignty presented to the Master earlier in these proceedings); and (c) Cuba's acknowledgment of Florida's regulatory authority, it is respectfully submitted that this Court, in the exercise of its equity powers in cases of original jurisdiction [*Ohio* vs. *Kentucky*, 410 U.S. 641 (1973); *Rhode Island* vs. *Massachusetts*, 14 Pet. (U.S. 210 (1840)] should remand this cause to the Master for consideration of the evidence in light of a lesser burden of proof to be imposed upon the State of Florida in establishing its inland sea boundaries as defined in the 1868 Constitution.

The "clear beyond doubt" test required by the Rule of *United States* vs. *California*, 381 U.S. 139 (1965), was clearly misapplied in the instant proceedings.

3.

The second point of difference between the parties which is described in the opening sentence of the United States' Argument (U.S. Exceptions, p. 7), is the Plaintiff's apparent reliance upon the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301-1315, as a controlling limitation upon the territory that is the State of Florida. The Act is not controlling (a) by its terms, and (b) because the Congress has no power to divest a State of its territory once that territory has been approved (i) in its admission Constitution, or (ii) by law subsequent to its admission.

In *United States* vs. *Florida*, 363 U.S. 121 (1960), this Court discussed the matter, treating the Submerged Lands Act not so much as a *grant of territory* as the grant of an opportunity to prove historic boundaries; not so much a conveyance of new land to the State as it was the *chance to demonstrate* that the geographical unit that comprises the territory of the State of Florida does not stop at the shoreline.

The suit was cast in terms of limited definition: whether Florida could prove historic boundaries three marine leagues seaward of her beaches in the Gulf of Mexico.

> ***The language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida. Upon proof that Florida's claims met the statutory standard – "boundaries. . . . heretofore approved by the Congress" – the Act was intended to "confirm" and "restore" the three-league ownership Florida had claimed as its own so long and which claim this Court had in effect rejected in *United States* v. *Texas*, 339 U.S. 707; *United States* v. *Louisiana*, 339 U.S. 699; and *United States* v. *California*. As previously shown, Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores.*** (363 U.S. at 128)

The separate concurring opinion by Mr. Justice Frankfurter adds emphasis:

> The one thing which I take to be incontestable is that Congress did not, by the Submerged Lands Act of 1953, make an outright grant to any of the Gulf States in excess of three miles. Congress only granted to each of these States the opportunity to establish at law that it possessed a boundary in excess of three miles, either by virtue of possession of such a boundary at the time of its admission to the Union or by virtue of Congressional "approval" of such a boundary prior to the enactment of the Submerged Lands Act.*** (363 U.S. at 129-310)

Thus, the controlling question is not whether Congress granted Florida a seaward boundary in the Submerged Lands Act, but whether Florida demonstrated an historic claim to boundaries beyond the three-mile limit in accordance with criteria outlined in the Act.

The Court ruled that Florida had demonstrated its historic claim by finding (a) that the State's 1868 Constitution had described seaward boundaries, and (b) that in the Admission Act of June 25, 1868, Congress approved them in response to requirements of the Reconstruction Acts of March 2 and March 23, 1867.

In so finding, the Court expressly overruled the United States' assertion that the Congress had not made careful scrutiny of the boundaries described in the Readmission Constitution.

> ***We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this Constitution was examined and approved as a whole, regardless of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this. Moreover, the Hearings and the Reports on the Submerged Lands Act show, as the Government's brief concedes, that those who wrote into that measure a provision whereby a State was granted up to three leagues if such a boundary had been "heretofore approved by Congress", had their minds specifically focused on Florida's claim based on submission of its 1868 Constitution to Congress.***

Florida's boundaries "confirmed" and "restored", then, by the Submerged Lands Act were those boundaries described in

its 1868 Constitution. They did not *originate* in 1953. They have been what they are for more than 100 years. And they extend, in places, more than three miles from the coastline into the Atlantic and more than three marine leagues from the beach in the Gulf.

The same boundary description approved by Congress and this Court speaks of Florida's territory extending "thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands . . ." There is no interruption in this call. It is a continuous line, without provision for "upper keys" or "lower keys" or island clusters severed from territorial continuity by virtue of channel depth or distance between low-tide elevations. Moreover, the seaward edge of the reef-line falls outside the three-mile limit, and the distance between the Dry Tortugas and Marquesas is in excess of six marine leagues. Does this mean that the boundary description recited above does not mean what it says, or that the territory of Florida is something less than described in its 1868 Constitution? The United States and the Special Master answer both questions affirmatively because they interpret the Submerged Lands Act to be a territorial grant. (Report, pp. 29-36; Exceptions, pp. 2, 15, 17).

If one accepts the premise that Florida's seaward boundaries originated in 1953, then the United States and the Special Master are correct and the State's case must be denied.

But, if one accepts the premise that Florida's seaward boundaries originated in 1868 – as approved by Congress – then the United States and the Special Master are in error when they seek to apply the 1953 Act as a limitation, shrinking Florida down to size consistent with a three-mile by three-league mold.

If there is any dilemma posed by these premises (and Florida respectfully submits that, since this Court's Opinion in No. 9 Original, there is scant reason to insist that, for purposes of these proceedings, the Submerged Lands Act is a territorial grant) wording of 43 U.S.C. § 1312 is helpful to show that the intent of Congress was not to assert an impermissible power to attempt the transfer of part of a state to the Federal or international maritime domain.

> ***Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its Constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

Thus, by its terms, the Submerged Lands Act makes room for historic boundaries which, like Florida's, rise seaward of the 3-mile or 3-league limits.

Any other interpretation of the Submerged Lands Act would be constitutionally unsound, unless it is suggested that Congress has power to dismember the States. Surely, an Act of Congress expressly lopping off the Keys from the State of Florida would be void and of no effect.

Either that, or the States and the Union of them, are something less than "indestructible." *Texas* v. *White*, 7 Wall. (U.S.) 700, 725 (1869). How, then, can it be posed that Congress impliedly intersected slices out of the Keys by quit-claiming a limited strip of territorial seabed to all coastal states in the Submerged Lands Act? It has not been argued that Congress has this power. Yet, the exercise of such power is necessary to the result.

II

THE CONDUCT OF FOREIGN AFFAIRS CANNOT EXCUSE AN ATTEMPT TO DIMINISH THE TERRITORIAL INTEGRITY OF A STATE OF THE UNION.

> *"When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution."*[4]

[4]Chief Justice Taney delivering the Opinion of the Court in *Martin* vs. *Waddell*, 16 Peters (U.S.) 366 at 410 (1842).

*"***To give to the United States the right to transfer the title to the shores, and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."*[5]

Throughout these proceedings, the United States' concern for its position with regard to foreign affairs has been paramount. It is the "international significance" of the Master's determination that Florida Bay is a juridical bay that brings exception from the Complainant, not the practical effect of such a finding vis-a-vis mineral rights.

The issue is framed in terms of international law, and arguments posed by the United States are arguments more appropriately made in some international court between disputing nations. An example is at page 12 of the United States Exceptions, where, from the Government's "foreign affairs" point of view, the issue controlling the Master's juridical bay finding is crystalized:

> ***The question here is not whether the headland of a bay may be located on an island, but rather whether a juridical bay may be formed by a fringe of islands projecting out from a generally flat or convex mainland.

In all due respect to the United States, it is submitted that reliance upon international law or conventions or the implementation of foreign affairs is not material to the core issue. Such considerations are only peripheral to the center of our controversy and obscure the nature of the case.

There is nothing in the record to indicate that innocent passage of foreign shipping is, in fact, frustrated by Defendant's assertion that the Keys out to and including the Tortugas constitute an integral part of the State of Florida. Nor is there any evidence that innocent passage in the area between the Keys and the mainland, denominated Florida Bay, has been or will be denied should the area be found to be an historic bay constituting inland waters of the State of Florida.

[5]Mr. Justice McKinley delivering the Opinion of the Court in *Pollard's Lessee* vs. *Hagan*, 3 How. (U.S.) 212 at 230 (1845).

While the State is in sympathy with the United States in all problems involving international relations, it is respectfully submitted that decisions by Indonesia and the Phillipines to draw baselines connecting their outer islands cannot affect the outcome of a domestic dispute between the United States and Florida over location of the State's seaward boundary.

If, as Florida urges, it can be demonstrated by a reasonable preponderance of the evidence, that Florida Bay is an historic bay, then exceptions raised and discussed by the United States will be deemed moot. But if not, if the Court sustains the Master despite evidence discussed here that he applied an unfair and unwarranted evidentiary burden, then it is respectfully submitted that foreign policy considerations are secondary to considerations of Federal-State relations at issue here. The position of the United States as to disapproving use of baselines to connect Indonesian islands may change overnight (as, indeed, certain United States' positions vis-a-vis territorial sea, contiguous zone and high seas have dramatically changed during the presently on-going Law of the Sea Conference), but the state-federal balance sought during this continuing process of developing a more perfect Union is a permanent and unyielding demand upon all of us.

Certainly, if Florida Bay is an historic bay and, hence, part of the inland waters of the State, foreign policy considerations would hardly justify application of closing lines as required by the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606 (See, U. S. Exceptions, pp. 9, 16-17). To suggest that inland waters of the State can be annexed to the Federal or international maritime domain because of their *navigability* or for reason of foreign policy considerations in another part of the world is to suggest a *non sequitur* and to deny lessons of previous cases. In *DeGeofroy* vs. *Riggs*, 133 U.S. 258, (1889), dictum at page 267 instructs against use of treaty power to violate State sovereignty.

> ***The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the

government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent.***

This is certainly not new. The territorial and political integrity of states have been challenged before and upheld by this Court. If the State of Florida is "endowed with all the functions essential to separate and independent existence", *Lane County* v. *Oregon*, 7 Wall. (U.S.) 76 (1869), then neither the Congress via legislation nor the Executive Department via international treaty may diminish State territorial sovereignty. If they can, paraphrasing Mr. Justice Lurton in *Coyle* vs. *Smith*, 221 U. S. 559 at 580 (1910), an 'equal footing doctrine' case, then the Union will not be the Union of the Constitution.

Thus, when the United States excepts to the Master's conclusions for reasons of law according to the Convention on the Territorial Sea and the Contiguous Zone, it again raises the shadow of a *non sequitur*, for decisions divesting Florida of its territory cannot be so founded.

It is clear from reports to the Senate Committee on Foreign Relations by Mr. Arthur H. Dean, special consultant to the Department of State, who was Chief of the United States delegation at the negotiations in Geneva which resulted in the Convention on the Territorial Sea, that the Convention was not meant to affect relative rights as between the several states of the United States and the Federal Government, but was only to affect the rights of the United States as a sovereign state with respect to the rights of other sovereign states. (See, Congressional Record-Senate, April 26, 1960, page 11191). Florida's stipulation agreeing with the United States that 'pertinent sections' of the Convention would govern determination of Florida's coastline was entered into in good faith to seek a common ground, particularly of definitions, where they seemed appropriate. It was not meant as a surrender to an international view of this controversy. Nor by such stipulation could counsel for these parties endow the Conventions with a force and a relevance never accorded them by their architects.

CONCLUSION

It should be noted that the essential nature of evidence argued herein, i.e. the danger zone regulations demonstrating definitive acts of United States' sovereignty in Florida Bay, and Senator Fulbright's report to the Senate that the Cuban government had acquiesced in observing Florida's shrimp conservation regulations in Florida Bay, has not been put squarely to the Master in argument, and that the United States has not had opportunity to comment about these specific matters. They appear in this Brief by consent of the United States conveyed to the undersigned.

In view of this evidence, it would be difficult to maintain a position grounded on an absence of acts of dominion by the United States in Florida Bay. Thus, the California II Rule of evidence should not have been imposed upon Florida.

Inasmuch as the United States has had no opportunity to respond to this material, it is Florida's position that this matter should be remanded to the Special Master for consideration of the evidence under a different test than that thus far imposed.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel

August, 1974

Department of Legal Affairs
725 South Calhoun Street
Bloxham Building
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Response to Exceptions of the United States to the Report of the Special Master filed by Defendant, STATE OF FLORIDA, have been served upon Robert H. Bork, Solicitor General of the United States of America; and Michael W. Reed, Esq., Department of Justice, Washington, D.C., 20530, Attorneys for Plaintiff; and Brice M. Clagett, Esq., Covington & Burling, 888 Sixteenth Street, N.W., Washington, D.C., 20006, Attorneys for Amici Curiae, by United States Mail this 8th day of August, 1974.

DANIEL S. DEARING
Chief Trial Counsel
Attorney for Defendant,
STATE OF FLORIDA.